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Suburbs Under Siege: Race, Space and Audacious Judges

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BOOK NOTE

SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES. By Charles M. Haar. Princeton: Princeton University Press, 1996. pp. xiv, 256. $29.95.

*Reviewed by Abigail T. Baker**

I. INTRODUCTION

Across the United States, cities are witnessing a mass exodus into the suburbs with increasing frequency.[1] The prestige that once attached to urbanites[2] is now equated with these "new suburbanites." Claiming better schools,[3] safer neighborhoods[4] and overall peace of mind,[5] the new suburbanites have been

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1. The 1990 Census reported that 46% of the total U.S. population lives in the suburbs, while 31.3% lives in the cities. BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING, SOCIAL AND ECONOMIC CHARACTERISTICS, METROPOLITAN AREAS 88 (1990).

2. *See* KENNETH T. JACKSON, CRABGRASS FRONTIER (1985). Jackson states that cities were populated by the wealthy who did not want to walk far from their home to the office.

> There was the tendency of the most fashionable and respectable addresses to be located close to the center of town. In Europe, this affinity for the city's core represented the continuation of a tradition that dated back thousands of years. To be a resident of a big town was to enjoy the best of life, to have a place in man's true home. To live outside the walls, away from palaces and cathedrals, was to live in inferior surroundings.

Id. at 15.

3. *Id.* at 289-90.

4. *See* Jerry Adler, *Paved Paradise*, NEWSWEEK, May 15, 1995, at 42, 44.

5. *See* Jerry Adler, *15 Ways to Fix the Suburbs*, NEWSWEEK, May 15, 1995, at

the pied-piper to thousands of other city dwellers. By and large, those that have been able to afford to move out of the cities are white, middle-class Americans.[6] Local exclusionary zoning, by permitting only certain types of homes to be built in a specific area, has rendered the American dream—owning a home in suburbia—unattainable for many. As a result, the inner cities remain shells of their former selves,[7] and have become invisible prisons for their lower-income, minority residents.

The "seeds" of exclusionary zoning can be seen in land-use regulation of the early twentieth century.[8] In 1926, the Supreme Court "placed its imprimatur on [the validity of zoning]"[9] in *Village of Euclid v. Ambler Realty Co.*[10] *Euclid* involved a Fourteenth Amendment challenge to a zoning ordinance that excluded "apartment houses, business houses, retail stores and shops, and other like establishments."[11] At its conception, Euclidean zoning was seen as the simple solution to preventing the character of a neighborhood from being subjected to the "whims of developers or the insistence of neighbors."[12] It was more effective than covenants and defeasible fees, which had the potential of disturbing the right of alienation.[13]

While Euclidean zoning was facially aimed to exclude uses,[14] it effectively excluded persons.[15] Indeed, Euclidean zoning gar-

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46 ("[G]etting up in Bucks County beats a full night's sleep in Brooklyn").

6. *Cf.* David Hatcher, *The Black Flight to the "Burbs,"* THE CRISIS, Jan. 1995, at 30; Alex Marshall, *The Quiet Integration of Suburbia: America's Fastest Growing Metropolitan Areas Contain Some of the Nation's Most Racially Balanced Neighborhoods*, AMERICAN DEMOGRAPHICS, Aug. 1994, at 9.

7. Joel Garreau correlates the downfall of the cities with the growth of Edge Cities, "hearths of our civilizations—in which the majority of metropolitan Americans now work and around which we live. . . ." JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER 3 (1991).

8. *See* Michael Allan Wolf, *The Prescience and Centrality of* Euclid v. Ambler, *in* ZONING AND THE AMERICAN DREAM 252 (Charles M. Haar & Jerold S. Kayden eds., 1989).

9. Michael Allan Wolf, *Takings Term II: New Tools for Attacking and Defending Environmental and Land-Use Regulation*, 13 N. ILL. U. L. REV. 469, 472 (1993).

10. 272 U.S. 365 (1926).

11. *Id.* at 390.

12. Wolf, *supra* note 8, at 254.

13. *See id.*

14. "Exclusion is the essence of Euclidean zoning." *Id.*

15. *See* CHARLES M. HAAR & JEROLD S. KAYDEN, LANDMARK JUSTICE: THE INFLUENCE OF WILLIAM J. BRENNAN ON AMERICA'S COMMUNITIES 149 (1989) ("By restricting the use, shape and size of buildings placed on the land, traditional land-use controls

nered much support due to the nascent xenophobia in the early twentieth century.[16] Today, seventy years after *Euclid*, it seems that only the faces have changed. Now, there is a fear of anything beyond the walls of suburbia.[17] It was the desire to preserve the content of suburbia—this fear of the different—that motivated the zoning ordinance that has become the subject of the seminal exclusionary-zoning case of the twentieth century: *Southern Burlington County NAACP v. Township of Mount Laurel*.[18]

For New Jersey, and some other states,[19] the *Mount Laurel* Doctrine[20] would forever alter the role of the courts in an area that has been traditionally reserved for the legislature.[21] What has prompted the most criticism[22] of the *Mount Laurel* Doctrine are the affirmative obligations and remedies the New

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indirectly, but fundamentally, affect the personal lives of individuals.").

16. *See* Wolf, *supra* note 8, at 255.

17. For a particularly lucid article on today's walled suburbs, see David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761 (1995).

18. 336 A.2d 713 (N.J.) (*Mount Laurel I*), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975), *modified and enforced*, 391 A.2d 935 (N.J. Super. Ct. Law Div. 1978), *rev'd in part and remanded*, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*). The heroine of *Mount Laurel* is Ethel Lawrence, who, in 1974, with the help of her daughter and niece, brought an action against *Mount Laurel* township. Lawrence's committee, the Springville Action Committee, planned to build about 100 units of low-income housing. The plan did not comport with *Mount Laurel*'s then existing minimum half-acre ordinance. When *Mount Laurel* refused to change the ordinance, Ms. Lawrence brought a lawsuit seeking an injunction against the ordinance and declaratory relief.

19. *See* Jerome G. Rose, *Waning Judicial Legitimacy, The Price of Judicial Promulgation of Urban Policy*, 20 URB. LAW. 801, 818 (1988) (discussing Oregon's attempt to codify *Mount Laurel* in its urban renewal plan); *cf.* John M. Payne, *From the Courts*, 20 REAL. EST. L.J. 75 (1991) (stating that New Jersey's *Mount Laurel* decisions will not have an effect in most states because of its judicial remedies).

20. The *Mount Laurel* Doctrine consists of the judicial remedies linked to *Mount Laurel I*, and its progeny *Mount Laurel II* and Hills Dev. Co. v. Township of Bernards (*Mount Laurel III*), 510 A.2d 621 (N.J. 1986).

21. *See, e.g.*, N.J. CONST. art. IV, § 6, para. 2 (1947).

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.

Id.

22. *See infra* part III.

Jersey Supreme Court articulated in *Mount Laurel II*.[23] The court, fed up with municipalities' half-hearted attempts[24] to comply with the obligation articulated in *Mount Laurel I*,[25] came down harshly in *Mount Laurel II*.[26] Some of the remedies the court created were subsidies,[27] incentive zoning,[28] zoning for mobile homes,[29] mandatory set-asides of low- and moderate-income units,[30] and least-cost housing.[31] The court, according to most critics, had become a "super-zoning board."[32]

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23. 456 A.2d at 390. *Mount Laurel II* was actually a consolidation of six cases: Urban League v. Township of Mahwah, No. L-17112-71 (N.J. Super. Ct. Law Div. Mar. 8, 1979) (unreported); Glenview Dev. Co. v. Franklin Township, 397 A.2d 384 (N.J. Super Ct. Law Div. 1978); Southern Burlington County NAACP v. Township of Mt. Laurel, 391 A.2d 935 (N.J. Super. Ct. Law Div. 1978); Caputo v. Township of Chester, No. L-42857-74 (N.J. Super. Ct. Law Div. Oct. 4, 1978) (unreported); Round Valley, Inc. v. Township of Clinton, No. L-29710-74 (N.J. Super. Ct. Law Div. Feb. 24, 1978) (unreported), *rev'd*, 413 A.2d 356 (N.J. Super. Ct. App. Div. 1980); Urban League v. Borough of Carteret, 359 A.2d 526 (N.J. Super. Ct. Ch. Div. 1976), *rev'd*, 406 A.2d 1322 (N.J. Super. Ct. App. Div. 1979).

24. Actually, some believe that the municipalities were not at fault, but that the courts misplaced their belief in the causal relationship between the mandates of inclusionary zoning and the "availability and unavailability of low cost housing." G. Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 556 (1984).

25. 336 A.2d at 718.

> [E]very ["developing municipality"] must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required to do so.

Id.

26. 456 A.2d at 410-411.

> After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, *Mount Laurel* remains afflicted with a blatantly exclusionary zoning ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but *Mount Laurel*'s determination to exclude the poor. *Mount Laurel* is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case.

Id.

27. *See id.* at 443-45.
28. *See id.* at 445-46.
29. *See id.* at 450-51.
30. *See id.* at 446-50.
31. *See id.* at 451-52.
32. John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Af-*

These remedies would not be as troublesome if they came from the legislature.[33] Instead, it was the New Jersey Supreme Court, without the explicit authority of the New Jersey Constitution,[34] that issued the remedies. In order to execute these remedies, the court called for the use of special masters who were experts in the field of planning[35] and put three trial court judges in charge of administering the remedies, making sure that they were completed.[36] To insulate itself from judicial review, the court altered the appellate rules of the supreme court,[37] and stretched the period of finality for a *Mount Laurel* court decision to six years.[38]

Almost all observers agree that the court provided a solution to the problem of exclusionary zoning.[39] While proponents of

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fordable Housing Policies, 16 REAL EST. L.J. 20, 27 (1987); *see also infra* part III.A.1.

33. *See* Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?* 17 HARV. ENVTL. L. REV. 333, 360 (1993) ("[T]he resemblance of the court's ruling to a piece of detailed legislation accentuates the court's appropriation of legislative and executive powers in enforcing this constitutional provision."); *see also infra* part IV.A.1 (discussing the FHA's role in the separation of powers context).

34. The New Jersey Constitution does not contain a due process clause or an equal protection clause, both of which are necessary for the court's argument that there is a right to affordable housing. Instead, the court said that a right to affordable housing exists in Article IV of the New Jersey Constitution which provides that: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, para. 1 (1947). This is a non-self-executing provision. Fernandez, *supra* note 33, at 361. A non-self-executing provision "must provide the court with a complete and enforceable rule." *Id.*

35. *Mount Laurel II*, 456 A.2d at 459. For a critical discussion on why masters are no better than the uninformed judges, see Jerome G. Rose, *New Additions to the Lexicon of Exclusionary Zoning Litigation*, 14 SETON HALL L. REV. 851, 870 (1984).

36. 456 A.2d at 458-59.

37. *Id.* at 458.

38. *Id.* at 459; *see* Rose, *supra* note 19, at 829-30; Tarr & Harrison, *supra* note 24, at 589.

39. *See* Rose, *supra* note 35, at 873-74. Rose argues that the court's role never ends because it is still responsible for "determining the eligibility of low income buyer/renters, reviewing rents and other charges to low income renters and approv[ing] purchasers and the initial and subsequent sale prices of housing units." *Id.* at 873. In addition, the court still has to determine issues that arise when there is a mortgage foreclosure, a default in rent, or the death of the owner; *see also* Robert F. Blomquist, *Solar Energy Development, State Constitutional Interpretation and* Mount Laurel II: *Second Order Consequences of Innovative Policymaking by the New Jersey Supreme Court*, 15 RUTGERS L.J. 573, 591-611 (1984) (discussing the solar energy problem related to the construction of housing pursuant to a *Mount Laurel* decision).

the *Mount Laurel* Doctrine see it as within the court's legitimacy,[40] others define the New Jersey Supreme Court's role as one of a "mini-legislature."[41] Ironically, the *Mount Laurel* Doctrine shares another characteristic with some of its land-use siblings: all have been criticized as having "gone too far."[42] According to the harshest critics, the *Mount Laurel* Doctrine violates standards of popular sovereignty,[43] separation of powers,[44] and good "judging."[45] For the advocates of *Mount Laurel*, the transgressions are not as great as the benefits. To them, the supreme court is an effective vehicle of social policy.

Professor Charles Haar's book, *Suburbs Under Siege*,[46] is a treatise on the judiciary's ability and duty to combat exclusionary zoning. Tracing the history of *Mount Laurel* and its progeny, *Suburbs* is convincing in its insistence that the judiciary is the correct instrument to effect social change. According to Haar, the role of the judiciary is that of a problem solver. Thus, the court's intervention was appropriate because the legislative and executive branches were deadlocked. The court's intervention was necessary because, as in other cases of institutional reform, the court is a last resort.

Certainly, successful rationalization of the *Mount Laurel* Doctrine is related to the value one places on correcting the

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40. *See infra* part IV.

41. *See* Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mt. Laurel Cases*, 70 NEB. L. REV. 186, 195 (1991) (quoting Simon Rifkin, *Are We Asking Too Much of Our Courts?*, 15 JUDGES J. 43 (1976)).

42. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). *See generally* M & J Coal Co. v. United States, 47 F.3d 1148, 1153 (D.C. Cir. 1995); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1176 (D.C. Cir. 1994); Florida Rock Indus. v. United States, 18 F.3d 1560, 1568 (D.C. Cir. 1994); Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239, 242 (1st Cir. 1990); Plantation Landing Resort, Inc. v. United States, 30 Ct. Cl. 63, 69 (1993).

43. *See infra* part III.A.

44. *See infra* part III.B.

45. *See infra* part III.C.; Payne, *supra* note 32, at 27 (1987) ("[J]udging . . . is to apply fixed rules rather than to make discretionary choices."); *see also* John J. Farmer, Jr., *Mitigating "The Frailties of Human Judgment": Justice Robert Clifford and the Sources of Judicial Legitimacy*, 25 SETON HALL L. REV. 1027, 1045 (1995) (to reduce the frailties of human judgments, opinions should be "susceptible of concise expression and clean interpretation so that they can aid in predictive art and persuade society that the decision is correct.").

46. CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES (1996) [hereinafter SUBURBS].

social problems created by exclusionary zoning. For Haar, exclusionary zoning has contributed to the "fragmentation and stratification of metropolitan areas into inner cities and proliferating suburbs."[47] This restructuring of the inner cities and suburbs has, in turn, created a "de facto apartheid" that incarcerates the inner cities' residents.[48] *Suburbs* sets up the balance so that it tips heavily in favor of judicial activism. *Suburbs* concedes that affirmative remedies set out by the New Jersey Supreme Court are extraordinary in their breadth and scope,[49] but concludes they are necessary for the social problems at issue.

This paper analyzes *Suburbs's* response to the recent criticisms of the *Mount Laurel* Doctrine. In Part II, the major themes of *Suburbs* are discussed. The three major criticisms of the *Mount Laurel* Doctrine—the violation of separation of powers, notion of sovereignty and good judging—are set out in Part III. Part IV examines *Suburbs's* responses to these major criticisms. Finally, Part V argues that *Suburbs* is successful in showing that the role of the judiciary in the *Mount Laurel* Doctrine was necessary and appropriate.

II. SUBURBS

Suburbs continues major themes expressed in Haar's earlier works by underscoring the nexus between the judiciary and socially responsible land-use planning.[50] Although the themes

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47. *Id.* at 4.

48. *See id.* at 6.

49. *See infra* parts IV.A and B.

50. *See* CHARLES M. HAAR & DANIEL W. FESSLER, THE WRONG SIDE OF THE TRACKS 228 (1986) ("American cities and towns continue to distribute services inadequately and to deny participation to politically and economically disadvantaged citizens. The challenge is to set about righting this wrong. To begin the process we suggest state courts as the forum and the common law as the vehicle."); HAAR & KAYDEN *supra* note 15, at 19-20 (While Justice Brennan believed that, "properly supported by sound planning, zoning is a positive instrument for the social economic and physical well-being of communities," he also thought that the "court's role should be limited, but only as long as there was evidence that the zoning was the product and reflection of sound planning."); CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND 89-91 (4th ed. 1989) ("Where competing land interests vie to dominate, the court is the traditional forum for decision. Realistically evaluated within the framework of the conven-

are similar, the message of Haar's *Suburbs* is unlike that of its predecessors. The stakes of the game in *Suburbs* are much higher; the practical effect of the *Mount Laurel* Doctrine is that it serves as informal precedent throughout the country for both the walled suburbs and their excluded minority residents. Therefore, *Suburbs* cannot afford to use the detached, theoretical tone characteristic of some of Haar's previous works. While *Suburbs* is committed to proving that the judiciary must get involved in the exclusionary zoning debate,[51] it also points out some of the flaws of the *Mount Laurel* Doctrine. In addition, *Suburbs* elucidates the struggle that emerged between the legislature and the judiciary and the applicability of some parts of the *Mount Laurel* Doctrine to different contexts.

A. *Winning the Battle but Losing the War*

To Haar, the message of the *Mount Laurel* Doctrine remained largely in the courtrooms. The courts' failure in gaining the public's support of the *Mount Laurel* Doctrine was the result of two errors. First, by predicating the right to fair housing on a wealth classification, the court alienated African-Americans who constituted the real victims of Mount Laurel. Second, in refusing to take advantage of the media or engage in out of court discussions, the court enveloped in secrecy the horrors behind the *Mount Laurel* Doctrine and its social implications.

Trapped in its economic segregation language, the opinion left African-Americans estranged from the real purpose of the *Mount Laurel* Doctrine: to bridge the gap between the ghetto and the suburb. The clearing of a constitutional stumbling block, while necessary for the *Mount Laurel* Doctrine's success, had its price. Justice Frederick W. Hall's careful manipulation of the language of *Mount Laurel I* accomplished its goal of thwarting federal judicial review by hinging the right to a fair opportunity to housing on economic segregation instead of racial segregation,[52] which would have triggered review under the

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tional syntax in which the courts operate, such decisions may be regarded as planning and zoning by the judiciary.").

51. *See infra* parts III & IV.

52. *Mount Laurel I*, 336 A.2d 713, 717.

Plaintiffs represent the minority group poor (black and Hispanic) seeking

equal protection clause. However, it had the effect of ultimately distancing African-Americans from the *Mount Laurel* Doctrine:

> [T]he *Mount Laurel* opinion may have fanned the flames of racial fear by not paying enough attention to it. Unfortunately, Chief Justice Wilentz believed in integration per se as a constitutional imperative and a societal goal. But the race issue was muted in his opinion; economic segregation was its dominant theme. Racial isolation, and its relation to class distinctions as the prime evil of exclusionary zoning, needed open discussion, not silent skirting.[53]

As a sad testament to the effects of avoiding the race issue, *Suburbs* recalls a story in which four months after being placed in a Yonkers neighborhood by a federal judge, African-Americans and their white neighbors had not yet exchanged greetings.[54] *Suburbs* argues that the *Mount Laurel* Doctrine should have induced resentment. In avoiding the race issue, *Mount Laurel I* may have inspired resentment instead of interaction.

Plagued by the tradition of solemnity, the *Mount Laurel* courts were reluctant to show the public the ugliness of exclusionary zoning. Without seeing the converted chicken coops of Springville—the unsightly homes of some of the *Mount Laurel* plaintiffs—the general audience would remain unmoved to the court's plight. As a special master in other institutional litigation,[55] Haar is adamant that "[c]onvincing the public of

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> such quarters. But they are not the only category of persons barred from so many municipalities by reason of restrictive land use regulations. We have reference to young and elderly couples, single persons and large, growing families not in the poverty class, but who still cannot afford the only kinds of housing realistically permitted in most places—relatively high-priced, single-family detached dwellings on sizeable lots and, in some municipalities, expensive apartments. We will not, therefore, consider the case from the wider viewpoint that the effect of *Mount Laurel*'s land use regulation has been to prevent various categories of persons from living in the township because of the limited extent of their income and resources.

Id. (citations omitted).

53. *See* SUBURBS *supra* note 46, at 169.

54. *See id.* at 167-68.

55. Quincy v. Metropolitan Dist. Council, No. 138,477 (Mass. Super. Ct., Dec. 17, 1982) (involving cleanup of Boston Harbor); Board of Educ. v. Boston, 434 N.E.2d 1224 (Mass. 1982); School Comm. v. Boston, 421 N.E.2d 1187 (Mass. 1981) (involving funding of Boston public schools).

the rightness of the court's actions is an essential element of any remedy."[56] By taking representatives of the press and television media on tours of Deer Island while he was master on the Boston Harbor cleanup case,[57] Haar was able to use the public's attention to garner judicial support.

Finally, Haar supports revision of the canon of judicial ethics[58] to allow judges in institutional litigation to respond to concerns their opinions may generate.[59] Recognizing that few "read lengthy legal opinions,"[60] Haar underscores the near impossibility of communicating the broad ideals of the *Mount Laurel* Doctrine to the public. "[T]he vision of a society based on diversity, plurality, and tolerance, couched in broad, constitutional terms such as *general welfare*, is a message that judges must not merely enunciate but also imbue with life and immediacy."[61]

It is speculative what substantive effect the court's failure to garner public support for the *Mount Laurel* Doctrine had on its overall success against the legislature. "Although the court was not likely to hold on indefinitely to the central position of leadership that it enjoyed at the outset of the exclusionary zoning battle, its diminished strength may be partly attributable to its own unwillingness to direct the public's imagination in salutary directions."[62] It is clear that the lack of support from public interest groups could have been part of the downfall. After clearing substantial hurdles that barred potential plaintiffs, the courts seemed to be begging for actions brought by public interest groups. "Had there been more visible support from public interest groups, the court might have struggled harder to make the actions of the three trial judges more broadly applicable

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56. SUBURBS, *supra* note 46, at 145.

57. *See id.* at 172.

58. MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(6) (1989).

A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. *Id.*

59. *See id.* at 173.

60. *See id.* at 172.

61. *Id.* at 173.

62. *Id.* at 162.

and to elaborate still further the principles of its doctrine."[63]

B. *The Ripostes of the Legislature and Judiciary*

What the judiciary had begun in *Mount Laurel I* and *II* did not go unnoticed by the municipalities. For many New Jersey residents, restrictive ordinances were appreciated for their ability to "keep[ ] land prices up, tax rates down, and undesirables out."[64] As the ordinances began to fall, the municipalities looked to the legislature for help. At that time, "the priority with the greatest urgency was finding some alternative to the judges; they wished to cast off the court's mandate."[65] Although appearing irreconcilable, the ensuing tangle between the legislative and judicial branches reveals a shared commitment to the goals set out in *Mount Laurel II*.[66]

To Haar, the battle between the two branches started after the New Jersey Supreme Court's decision in *In re Egg Harbor Associates*.[67] There, the court determined that the legislature, through New Jersey's Coastal Area Facility Review (CAFRA),[68] had conferred power on the Department of Environmental Protection (DEP) to zone for the general welfare.[69] Thus, the court stated, DEP "had the right, under CAFRA, to require developers to provide an appropriate amount of housing for low- and moderate-income households."[70] The court acknowledged that its broad interpretation of CAFRA could result in conflicts between DEP and municipalities, but justified its action based on the larger goal of housing reform.[71]

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63. *Id.* at 98.

64. *Id.* at 90.

65. *Id.*

66. 456 A.2d 390.

67. 464 A.2d 1115 (N.J. 1983). In *Egg Harbor*, the court approved a coastal zone development plan on the condition that a mandatory set-aside of 20% for low- and middle-income housing units be constructed. *See id.* at 1120.

68. N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1991).

69. "Although CAFRA is primarily an environmental protection statute, the powers delegated to DEP extend well beyond protection of the natural environment." *Egg Harbor*, 464 A.2d at 1118.

70. SUBURBS, *supra* note 46, at 91.

71. *See Egg Harbor*, 464 A.2d at 1119.

> We acknowledged that, in fulfilling its obligation with respect to low and moderate income housing, "mandatory set-asides keyed to the construction

Two years after *Egg Harbor* the Fair Housing Act (FHA)[72] was passed. The FHA was calculated to diffuse the power of the judiciary. Three significant steps towards this goal were the FHA's creation of the Council on Affordable Housing (COAH),[73] the Regional Contribution Agreement (RCA),[74] and its treatment of the builder's remedy.[75] According to *Suburbs*, these provisions carried a two-fold effect. "In the FHA, the New Jersey legislature seemed determined not just to supplant the courts as program administrators but to alter, in significant aspects, the nature of the regional fair share housing obligations that could be imposed on communities."[76]

In order to continue its participation in the enforcement of the *Mount Laurel* Doctrine, the judiciary needed to return the

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> of lower income housing, are constitutional and within the zoning power of a municipality." [T]he DEP requirement that 20% of the housing be for low and moderate income residents is just such a mandatory set-aside.

Id. at 1119-20 (quoting *Mount Laurel II*, 456 A.2d at 390).

72. N.J. STAT. ANN. § 52:27D-301 (West Supp. 1996).

73. *Id.* § 52:27D-305. The FHA charged the COAH with determining "housing regions of the State," "the present and prospective need for low and moderate income housing at the State and regional levels," and "[a]dopt[ing] criteria and guidelines for: (1) [m]unicipal determination of its present and prospective fair share of the housing need in a given region." *Id.* § 52:27D-307(a)-(c)(1).

In addition, the COAH provided an alternative forum for *Mount Laurel* cases. *See id.* § 52:27D-316. The COAH was given the power to issue a "substantive certification" which meant that the municipality's "fair share plan is . . . not inconsistent with achievement of low and moderate income housing needs of the region. . . ." and that the "affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible. . . ." *Id.* § 52:27D-314(a), (b).

74. *Id.* § 52:27D-312. The RCA provides, "A municipality may propose the transfer of up to 50% of its fair share to another municipality within its housing region." *Id.*

75. *Id.* § 52:27D-328 (West 1986). The FHA provided that no builders' remedies shall be granted to "a plaintiff in any exclusionary zoning litigation which has been filed on or after January 20, 1983, unless a final judgment providing for a builder's remedy has already been rendered to that plaintiff." *Id.* The ban on builders' remedies lasted for four months.

In addition, the FHA provided that a municipality's fair share would be adjusted if the "established pattern of development in the community would be drastically altered." *Id.* § 52:27D-307(c)(2)(b).

Finally, the FHA provided for a cap on the "aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing." *Id.* § 52:27D-307(e). Today, that cap is 1000 units. *See id.*

76. SUBURBS, *supra* note 46, at 93.

legislature's serve.[77] In light of the FHA's enactment, however, the judiciary was faced with a dilemma: how could it assure that the obligations of the *Mount Laurel* Doctrine were carried out, thereby preserving the judiciary's initial role, while remaining in the constraints imposed by the FHA? In three decisions after *Egg Harbor*,[78] the New Jersey Supreme Court was able to uphold the constitutionality of the FHA while still maintaining its ground as the "superpower" in the area of remedying exclusionary zoning.[79]

A troika of cases after *Egg Harbor* signify the New Jersey judiciary's gradual regaining of power. In the first case, *Hills Development Co. v. Township of Bernards*,[80] the New Jersey Supreme Court apparently acceded to the legislature's emerging role in enforcing the *Mount Laurel* Doctrine.[81] While the court,

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77. *See id.* at 117.

78. *See supra* notes 63-66 and accompanying text.

79. *See* SUBURBS, *supra* note 46, at 125.

80. 510 A.2d 621 (N.J. 1986). In *Hills*, builders of 12 townships and boroughs (Bernards, Bernardsville, Cranbury, Denville, Franklin, Holmdel, Monroe, Piscataway, Randolph, South Plainfield, Tewksbury, and Warren) had applied for transfer of *Mount Laurel* litigation to the COAH. Except for Tewksbury Township, transfer was denied in each case. *See id.* at 635. The builders brought an action compelling the New Jersey Supreme Court to rule on the validity of the trial court's motions. *See id.* at 634-35. Five of the townships (Bernards, Cranbury, Denville, Randolph and Tewksbury) were selected as representative of the 12 original plaintiff builder's claims. *See id.* at 635.

Central to the builders' claims was the interpretation of section 16 of the FHA which mandates transfer to the COAH any *Mount Laurel* litigation commenced more than 60 days before the effective date of the FHA, unless the transfer would result in "manifest injustice." *See id.* at 646, *construing* N.J. STAT. ANN. § 52:27D-316 (West 1986). The builders argued that the transfer would result in a delay in the "satisfaction of the *Mount Laurel* constitutional obligation." *Id.* at 642. In addition, the builders argued that "manifest injustice" would occur as a result of the "delay in producing low and moderate income housing caused by the transfer, as well as in the builders' loss of expected profits." *Id.* at 636. Specifically, they argued that the delay would "drastically affect the builder's business operations, which have depended on high-volume production." *Id.* at 637.

The court first addressed the builders' claims, then went on to analyze the FHA's contribution to the goals of the *Mount Laurel* Doctrine. In regard to the builders' arguments about the transfer provision, the court stated that 'manifest injustice' means injustice that is "unforeseen and exceptional." *Id.* at 647. Concerning the FHA as a whole, the court declared that "[l]egislative action *was* the relief we asked for, and today we have it." *Id.* at 645.

81. 510 A.2d at 654 ("While the Legislature has left a continuing role under the [FHA] for the judiciary in *Mount Laurel* matters, any such proceedings before a court should conform wherever possible to the decisions, criteria, and guidelines of the Council.").

in *Holmdel Builder's Association v. Township of Holmdel*,[82] again upheld the legitimacy of the FHA, it restated its commitment to the goals set out in *Mount Laurel I* and *II*. In *In re Warren Township*,[83] some of the legitimacy the New Jersey Supreme Court had granted to the COAH was retracted,[84] and the court's dominion over the *Mount Laurel* Doctrine was regained.

The banter between the legislature and the judiciary reveals their common goal of providing the best remedies to achieve the aspirations of the *Mount Laurel* Doctrine. *Suburbs* argues that while some may interpret the court's opinion in *Hills* as acquiescence, others might consider it to be a strategic move on the part of the judiciary.[85] "Having performed the job of herald, sounding the need for change, the court could retire with honor, leaving the field to the legislature's FHA—the result it had always sought."[86] *Suburbs* suggests that overall the legislature is better able to adapt to the municipalities' hardships:

> Perhaps in being rubbed into reality's mud and forced to confront individual circumstances, the courts would have developed an adjustment methodology better tailored than the FHA's to the realities of specific local situations. Yet legislative fiat is undoubtedly a speedier, if rougher, way of responding to the hardships that inevitably arise in the

82. 583 A.2d 277 (N.J. 1990). At issue in *Holmdel* was the constitutionality of requiring builders to pay mandatory fees in order to get a permit. *See id.* at 281. Stating that the COAH provided regulations that allowed a voluntary fee in exchange for an offsetting incentive, such as a density bonus, the court found the fees to be constitutional and statutorily authorized. *See id.* at 290-92, 295. In addition, the court expressly stated that the fees were not inconsistent with the FHA. *See id.* at 295.

83. 622 A.2d 1257 (N.J. 1993). The court struck down a COAH regulation allowing a municipality to grant an "occupancy preference for 50% of such housing to income-eligible households that reside or work in the municipality." *Id.* at 1258. The local preference had a disparate racial impact; the number of minorities in the region was much greater than that in the municipality, thus the local preference had the effect of favoring white households over minority households for newly constructed affordable housing. *See id.* at 1259.

84. *See id.* at 1271 ("Notwithstanding the deference to which COAH is entitled in adopting regulations to implement the expansive goals of the [FHA], we are unable to find on this record that the occupancy preference furthers those legislative policies.").

85. *See* SUBURBS, *supra* note 46, at 96-98.

86. *Id.* at 97.

> application of a uniform rule such as the Mount Laurel Doctrine.[87]

In a way, the back and forth witnessed between the legislature and the judiciary served the important function of assuring that the most efficient remedy, or "carrot," would be used.

Likewise, the New Jersey Supreme Court's handling of the COAH in *Holmdel* and *Warren* signifies its desire to remain a "superpower" in the area of land-use planning,[88] and yet share the burden with the COAH of deciding a municipality's compliance with the *Mount Laurel* Doctrine.[89] *Suburbs* states that, "[e]ven when the legislature moves in with its enactments, seeking to preempt the field, it cannot relegate the judiciary to a backwater."[90] Still, the court does not appear interested in carrying on its shoulders the weight of assuring compliance with the *Mount Laurel* Doctrine. By deferring to the COAH's fee ordinance regulation in *Holmdel*, the court "lent the agency its own mantle of power."[91]

C. *Applying Tenets of the* Mount Laurel *Doctrine in Other Contexts*

Suburbs suggests that the *Mount Laurel* Doctrine may have use outside the specific context of New Jersey's land-use dilemma.[92] Unfortunately, the exclusionary zoning practices of Mount Laurel Township are not uncommon. Many other municipalities throughout the United States share with the residents of *Mount Laurel* the frustration of balancing the have's with the have-not's. In addition to its articulation of specific remedies, the *Mount Laurel* Doctrine contains ideals that could be applied to other contexts. The fact that municipalities will continue to face the same dilemma, as did Mount Laurel Township, provides a strong argument for the persuasiveness of the *Mount Laurel* Doctrine.

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87. *See id.* at 110.
88. *See id.* at 125.
89. *See id.* at 123-24.
90. *Id.* at 125.
91. *Id.* at 118.
92. *See id.*

The New Jersey Supreme Court's "broad redefinition of the term *general welfare*" intimates that municipalities outside New Jersey may have the responsibility to zone for the region, and not for their own welfare.[93] The *Mount Laurel* Doctrine stands for the proposition that a suburb shall not hide under the auspices of the police power of the state while trying to "maintain itself as an enclave of affluence or of social homogeneity."[94] Thus, suburbs will be unable to keep out certain classes and races through laws that require houses with minimum lots or floor space. Each municipality will have to consider how it will provide for its share of the region's housing needs. In a particularly apocalyptic way, Haar writes that suburbs "may not refuse to confront the future by building moats around themselves and pulling up the drawbridge."[95]

In addition, the *Mount Laurel* cases imply that local regulations that have extra-local effects should not be granted the presumption of validity that historically has been given.[96] The *Mount Laurel* Doctrine provides a basis for states to more strictly review ordinances that are locally enacted, but that carry extralocal implications. First, the New Jersey Supreme Court showed that it would alter the rational basis test—the level of review under which most local ordinances are upheld—if the ordinance involved an issue of "fundamental import."[97] Haar suggests that the "willingness" showed by the court could extend "to other issues of metropolis-wide concern, such as air pollution, the location of waste treatment plants, or the building of hospitals, sewer systems, or other major facilities."[98]

Second, the court made it significantly easier for one to attack the legislative validity of an ordinance.[99] By focusing on the effect of the municipality's regulation, rather than the motive and intent, the court removed the significant hurdle of proving a municipality's desire to exclude others.[100] Ordinanc-

93. *Id.* at 193.
94. *Id.*
95. *Id.*
96. *See id.* at 194.
97. *Id.*
98. *Id.*
99. *See id.*
100. *See id.*

es do not need to be made with racial intent, they need only affect a municipality in a discriminatory way.

Obviously, the *Mount Laurel* Doctrine is not binding authority on other states. *Suburbs* offers a rational explanation why states may choose to follow it.

> What makes the *Mount Laurel* dilemma so poignant is that the court's crafting of one principle—the ideal of equality of opportunity regardless of race, ethnicity, or income—clashed with another highly valued article of faith: people's deeply rooted belief in their right to defend bastions against would-be invaders. The suburban enclave is a continuation of the old idea—strong in American tradition—of the preeminence of the local community. Home rule, grassroots, the right of association, and neighborhood invincibility, are basic building blocks of local government arrangements. The *Mount Laurel* Doctrine, with its emphasis on the fairness of equal sharing of the burdens of metropolitan existence and equal access to the suburban lifestyle, challenges all these tenets.[101]

Simply, every municipality faces the dilemma encountered by the township of *Mount Laurel*.[102] Assuring the reader that *Mount Laurel* is not a singular experience, Haar writes: "[b]orn out of a singular mandate to interpret and guarantee the constitutional rights of all Americans, the judicial vision represented by the *Mount Laurel* experience offers a signal lesson for reducing the economic and social chasm arising from the isolation of the poor in central cities. . . ."[103] Thus, the applicability of the *Mount Laurel* Doctrine may only be limited by a particular municipality's ability to look beyond its walls. As Haar writes, "No longer is our prime task to tend our gardens—unless we take a more expansive view of the garden's extent."[104]

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101. *See id* at 9.

102. Not every state, however, has chosen to build housing in the suburbs for its low- and moderate-income residents. For example, Oregon established a Land Conservation and Development Commission with the goal of revitalizing the urban areas. *See* OR. REV. STAT. §§ 197.030-.040, -.175 (1989).

103. SUBURBS, *supra* note 46, at xiv.

104. *Id.* at 193.

III. CRITICISMS OF THE *MOUNT LAUREL* DOCTRINE

The criticism of the *Mount Laurel* Doctrine can be divided into three major concerns. First, according to opponents, the *Mount Laurel* Doctrine violated the constitutional notion of separation of powers. The New Jersey Supreme Court issued remedies that resembled legislation and required administrative mechanisms to implement. Second, the *Mount Laurel* Doctrine was the product of an unaccountable judiciary. Because they were not elected, the judges were able to act capriciously. Finally, the *Mount Laurel* Doctrine, as the product of the adjudicatory process, represented a simplistic solution to a complex social problem. The judiciary is not the appropriate place for the setting of a complex social problem such as exclusionary zoning, due to a lack of information, the nature of the judicial process, and the inherent short-sightedness of judicial decision-making.

A. *Separation of Powers*

The doctrine of separation of powers is grounded on the notion that each branch must work efficiently in order to be effective.[105] The structure and unique characteristics of each branch lend themselves to the role that the branch performs, and in turn, the branch creates its own legitimacy in performing particular duties. When a branch usurps the duties of another branch, the doctrine is violated and two results occur: both branches are deemed to be working inefficiently and the legitimacy of both branches is undermined. For these reasons, critics of the *Mount Laurel* Doctrine agree that the judiciary was not the correct forum for solving a complex problem such as exclusionary zoning.[106] They argue that the *Mount Laurel*

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105. "Montesquieu had offered two distinct justifications for organizing government on principles of separation of powers: such a structure prevents the concentration of power, thereby discouraging tyranny: in addition, it makes possible specialization of function, thereby furthering efficient government. The American vision of separation of powers enthusiastically embraced the efficiency as well as the control strand of Montesquieu's theory." Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 521 (1989) (footnote omitted).

106. Notably, it was in *Oakwood at Madison, Inc. v. Township of Madison* that the New Jersey Supreme Court recognized that the solution to the *Mount Laurel* problem "should be taken elsewhere." 371 A.2d 1192, 1268 (N.J. 1977) (Clifford, J., concur-

Doctrine's creation of intricate remedies and an administrative scheme to implement the remedies constituted an intrusion into both the legislative and executive branches of government. These impositions not only expended the resources of the judiciary, but they detracted from the legitimacy of both branches.

1. Intrusion into the Legislative Branch

The *Mount Laurel* Doctrine was complex in its remedial scope. It imposed on municipalities the burden of providing mandatory set-asides[107] and "least-cost" housing.[108] Mandatory set-asides were "inclusionary device[s]" designed to compel developers to meet the region's fair share obligations.[109] "Least-cost" housing was a fall-back position of the *Mount Laurel* court that was triggered after courts recognized that "[t]here may be municipalities where special conditions such as extremely high land use costs make it impossible for the fair share obligation to be met even after all excessive restrictions and exactions . . . have been removed."[110] Mandatory set-asides and least-cost housing both entail calculations of variables such as regional fair share and price on the conventional suburban housing market. They serve as examples of the *Mount Laurel* Doctrine "resembl[ing] . . . a piece of detailed legislation."[111]

Exclusionary zoning in general, and the calculation of the regional housing need, are necessarily public policy issues. The issues are not black and white, but often entail foresight that only an urban planner has. The more complicated the problem, the more an inexperienced, unknowledgeable court is forced to predict the result. The court has neither the time nor the expertise to foresee future implications of zoning ordinances and thus is compelled to guess the possible consequences of zoning

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ring).

107. *See Mount Laurel II*, 456 A.2d 390, 446-50.

108. *Id.* at 451-52.

109. *Id.* at 446.

110. *Id.* at 451.

111. Fernandez, *supra* note 33, at 360.

decisions. As one opponent suggests, these "*predictions* and calculations . . . subsume public policy decisions completely outside the scope of the judicial mandate."[112]

Critics of the *Mount Laurel* Doctrine assert that exclusionary zoning is the result of a political process and thus should be changed only as a result of the political process.[113] Zoning is the legislative manifestation of a social goal. While the intended effect of the social goal, the exclusion of lower-income people, is not palatable to society, it nevertheless is a valid articulation of an appointed body, the zoning board. The judiciary is not a proxy for the political process, but the *Mount Laurel* court still "substituted its judgment for that of the political process, in effect re-prioritizing social goals as ordered by zoning decision makers."[114]

By forcing itself into the realms of the other branches, the New Jersey Supreme Court caused its legitimacy to wane. When the public recognizes that the court has usurped the authority to promulgate zoning ordinances, it will not feel as bound by these ordinances.[115] Likewise, lower courts will not feel that they are bound to those courts that do not "conform to and abide by accepted legal principles limiting their authority."[116]

2. Intrusion into the Executive Branch

A court's involvement with the process of effecting social change does not just end with the creation of a remedial scheme. The administration of the remedy can also trigger a separation-of-powers claim because of a court's usurpation of the executive branch's enforcement power. The *Mount Laurel*

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112. Rose, *supra* note 19, at 829 (1988).

113. Rose, *supra* note 35, at 870. "[O]nce planning studies are made and professional evaluations of those studies are offered, the planning process must be continued in a forum comprised of elected representatives who possess the democratic and constitutional authority to make policy decisions." *Id.*

114. Sebastian C. Pugliese, III, Comment, *Environmental Justice: Lowering Barriers to Participation*, 1995 WIS. L. REV. 1177, 1204. "[t]he adjudicatory process must continue to expend resources in attempting to achieve the desired social goal". *Id.* at 1205.

115. Rose, *supra* note 35, at 885.

116. *Id.*

Doctrine, by committing itself to achieving the desired end (inclusionary zoning) by any means necessary, was compelled to enforce its own complex ruling.[117]

Faced with limited resources, the *Mount Laurel* courts could not afford to enforce their own remedies. One of the frustrations the *Mount Laurel II* court had was with the "high cost of the *Mount Laurel I* issues."[118] *Mount Laurel I* issues were not as complex as the issues that arose out of *Mount Laurel II*.[119] Taking on the additional step of administering the remedies expended so much of the court's resources that the judicial process was literally overwhelmed.[120]

The *Mount Laurel* courts, in the absence of a "complete and enforceable rule," created a right to affordable housing out of the state constitution.[121] The implications of creating constitutional rights are significant.[122] Expending resources and intruding in the domain of the legislature and the executive branches, the *Mount Laurel* courts disregarded other viable options.[123] Although it would involve a break in the litigation,

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117. *See* Fernandez, *supra* note 33, at 360 (discussing the "court's appropriation of legislative and executive powers in enforcing this constitutional provision."); Rose, *supra* note 35, at 873 (stating that the *Mount Laurel* Doctrine intrudes into the executive branch when it forces trial courts to set up administrative mechanisms to determine rent issues); Pugliese, *supra* note 113, at 1204-05.

118. Rose, *supra* note 19, at 828. Rose portrays the *Mount Laurel II* court as a petulant child frustrated with municipalities' stubbornness in obeying the court's ruling in *Mount Laurel I*. Notably, Rose suggests that the court was worried that it would lose "jurisdiction and control of its policy and program against exclusionary zoning." *Id.*

119. While *Mount Laurel I* set out what was to be done, *Mount Laurel II*'s purpose was to put "some steel in [*Mount Laurel I*]." *Mount Laurel II*, 456 A.2d 390, 410. Chief Justice Robert N. Wilentz wrote:

> We have learned from experience, however, that unless a strong judicial hand is used, *Mount Laurel* [*I*] will not result in housing, but in paper, process, witnesses, trials and appeals. We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it.

Id. If length is any indication of complexity, it should be noted that *Mount Laurel II*'s opinion ran 120 pages.

120. Rose, *supra* note 19, at 822; *see also infra* part III.C.

121. Fernandez, *supra* note 33, at 361; *see also supra* note 34.

122. *See generally*, Tarr & Harrison, *supra* note 24.

123. *See* Pugliese, *supra* note 113, at 1205. Pugliese suggests that an executive order may have been appropriate in the *Mount Laurel* cases because it would shoulder the "prohibitive cost of data characterizing any link between undesirable land uses and health and environmental effects." *Id.* (citation omitted). It seems,

using an executive order would have avoided a separation-of-powers argument and saved the court valuable resources.

B. *Popular Sovereignty*

Opponents argue that the *Mount Laurel* judiciary is not accountable for its rulings. Owing to affirmative steps taken by the *Mount Laurel II* court[124] and the setup of the New Jersey judiciary,[125] *Mount Laurel* courts enjoyed insulation from criticism from the federal courts[126] (judicial review) or the majority (countermajoritarian dilemma).

1. Avoiding Judicial Review

The *Mount Laurel* courts eluded federal judicial review by basing their rulings solely on state constitutional issues.[127] The New Jersey Constitution contains neither a due process clause nor an equal protection provision, yet the *Mount Laurel II* court needed to craft a right to affordable housing so that it could legitimately create and implement remedies to achieve its goal. Thus, the court crafted a right to affordable housing out of the general welfare clause of the constitution.[128] Although the Supreme Court of New Jersey has "the capacity to create necessary definitions or procedures" to aid in "the enforc[ing] of a constitutional provision,"[129] the use of these definitions as a bulwark from legitimate review elicits caution.[130]

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however, that in the case of *Mount Laurel*, the data was available to the judiciary, thus making obsolete the need for further information.

124. *See generally Mount Laurel II*, 456 A.2d 390 (N.J. 1983); Rose, *supra* note 35, at 835, 855.

125. *See* DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA 63-112 (1995).

126. *See* Berger, *supra* note 41, at 190.

127. *See* Township of Mount Laurel v. Southern Burlington County NAACP, 423 U.S. 808 (1975) (dismissing appeal and denying certiorari).

128. *See supra* note 34.

129. Fernandez, *supra* note 33, at 361.

130. *See* Rose, *supra* note 35, at 835, 865. "[T]he 'real' due process and equal protection clauses in the Federal Constitution create genuine legal problems." *Id.* Specifically, Rose argues that the mandatory set asides portion of the ruling is in violation of the equal protection clause because of its "confiscatory impact taken together with evidence illustrating the limited effectiveness of the regulation in achieving its objective." *Id.* at 866. Mandatory set-asides unreasonably discriminated against the class

In order to avoid intermediate review from the state judiciary, the *Mount Laurel II* limited the jurisdiction of *Mount Laurel* cases to only three trial court judges,[131] and made appeals of these decisions direct to the supreme court.[132] This "manipulation of judicial personnel" ensured that an independent trial judge who disagreed with the *Mount Laurel* Doctrine never sat for a *Mount Laurel* trial.[133] With the fixing of interlocutory appeals, the facts and law of *Mount Laurel* cases received a non-rigorous review by the court that promulgated the original ruling.[134] In addition, the period of finality for *Mount Laurel* cases was set for six years, although a concession was made for extenuating factual circumstances.[135]

According to critics, by defending its opinion from scrutiny, the supreme court has perpetuated the belief in the minds of the public that the correct role for the court is that of a "mini-legislature."[136] Under the remedies created in *Mount Laurel II*, it would be extremely rare for a *Mount Laurel* case to be overturned or even criticized. By building up a record of consistent holdings, *Mount Laurel* courts would establish an impressive precedent. For the public, the consistent treatment of municipalities would create the impression that there was something other than judicially created support for the *Mount Laurel* Doctrine. The public's impression that the *Mount Laurel* Doctrine was a judicial mandate that received "widespread judicial support"[137] would foster the notion that the courts are adequate problem-solvers.

2. Countermajoritarian Dilemma

The justices on the New Jersey Supreme Court are appointed for a period of seven years, then receive life terms should their

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by making a small component—"the developers or owners of real estate and/or the purchasers or renters of the housing units"—bear the burden of providing for a regional housing need. *Id.*; *see also id.* at 879.

131. *Mount Laurel II*, 456 A.2d 390, 419.

132. *See id.* at 458.

133. Rose, *supra* note 19, at 831.

134. *See id.*

135. *Mount Laurel II*, 456 A.2d at 458.

136. Berger, *supra* note 41, at 195.

137. Rose, *supra* note 19, at 831.

appointments be successfully reconfirmed by the Senate.[138] Policymaking had long been a part of the supreme court's history.[139] One justice remarked that the court's power of persuasion is legend: "we can encourage the [state] legislature to pass laws or taxes without directing them to do that. This is the wonder of our system, and besides it works to accomplish our judicial objectives."[140] The objectives of the supreme court need not coincide with the objectives of the majority. In his seminal work, *The Least Dangerous Branch*, Alexander Bickel terms this controversy the countermajoritarian dilemma.[141]

The New Jersey Supreme Court certainly had "no democratic mandate to make public policy decisions."[142] Any sense of accountability, therefore, had to come from the justices' own sense that the their rulings were violating basic notions of judicial restraint.[143] For an activist bench such as the New Jersey Supreme Court,[144] however, accountability is more an anathema

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138. *See* N.J. CONST. art. VI, § 6, para. 3 (1947).

139. *See* KIRP ET AL., *supra* note 125, at 63-65. The history of the New Jersey Supreme Court is noteworthy. In 1947, New Jersey's state courts, once the epitome of the common-law court system, began their transformation from the "nation's worst" to a hotbed of activism. *Id.* Arthur Vanderbilt, a former president of the American Bar Association and dean of the University of New York Law School, instituted reform that would end the history of the courts being used as the governor's lackeys. Vanderbilt believed that policymaking was "the proper business of state judges . . . because the law 'derives its life and growth from judicial decisions which . . . abandon an old rule or substitute . . . a new one in order to meet new conditions.'" *Id.* at 64.

Chief Justice Joseph Weintraub, who succeeded William Brennan on the bench, said that the supreme court has a "creative responsibility for making law." *Id.* at 64. Weintraub recognized the ramifications of creating law when he exclaimed before leaving the bench prior to the rehearing of *Mount Laurel I*, "Cases of this magnitude should be decided by [judges] who have to live with the decisions." *Id.* at 78.

140. *Id.* at 64-65.

141. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986). Bickel's countermajoritarian difficulty occurs as a result of the judiciary not being an elected body. They are not accountable to the majority when they "invalidate" majoritarian difficulties.

In those states with elected judiciaries, a "majoritarian difficulty" would apply. The majoritarian difficulty is how "elected judges can be justified in a regime committed to constitutionalism." Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995).

142. Rose, *supra* note 19, at 821.

143. *See* Oakwood at Madison v. Madison Township, 371 A.2d 1192, 1268 (N.J. 1977).

144. *See* Lionshead Lake v. Township of Wayne, 80 A.2d 650 (N.J. Super. Ct. Law Div. 1951) (striking down minimum living space requirements for residential dwell-

than a duty. For this reason, critics argue that the *Mount Laurel* Doctrine "may rest upon little more than a set of undeclared and elusive principles of social, economic, and political philosophy of the members of the court."[145]

C. *The Adjudicatory Process*

After the dust had settled, it was not known whether the public, the ultimate audience of the *Mount Laurel* Doctrine, would get its message. While there are no established criteria for dissemination of an opinion or doctrine, according to some, the *Mount Laurel* Doctrine is not what the public views as "good judging."[146] According to the leading critics of *Mount Laurel* Doctrine, good judging is the "appl[ication of] fixed rules rather than [the making of] discretionary choices."[147] The adjudicatory model is inapposite to the idea of good judging. The *Mount Laurel* Doctrine was the product of ill-informed judges, subject to the rigid rules of court procedure and too simple to be a real remedy for such a complex problem.

1. Judges With Only Generalized Knowledge

The *Mount Laurel* litigation demanded specific knowledge of the art and science of planning. The lingo, ideas and concepts of land use were relatively new to the judges. Calculating regions and fair shares was not in the intellectual domain of the justices.[148] To combat this problem, *Mount Laurel II* divided New Jersey into three parts and "authorized . . . a single judge, who would be responsible for determining everything from liability to remedy in a single proceeding."[149] It was intended that the *Mount Laurel* judges "would develop the expertise

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ings), *rev'd*, 89 A.2d 693 (N.J. 1952), *appeal dismissed*, 344 U.S. 919 (1953); Brookdale Homes v. Johnson, 10 A.2d 477 (N.J. Sup. Ct. 1940) (striking down minimum building height requirements for residential dwellings), *aff'd*, 19 A.2d 868 (N.J. 1941).

145. Rose, *supra* note 19, at 855.

146. *See* Payne, *supra* note 32.

147. *Id.* at 27.

148. *See* Rose, *supra* note 19, at 821; *see also* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 25 (1977).

149. KIRP ET AL., *supra* note 125, at 102.

needed to handle this complex litigation."[150] By combatting a general lack of knowledge, *Mount Laurel II* was able to stack the deck against any possible tampering with the doctrine they had laid out in *Mount Laurel I*.[151]

The *Mount Laurel II* court also sanctioned the use of special masters[152] in all *Mount Laurel* proceedings.[153] Special masters were to facilitate rewriting of the town ordinance.[154] Critics of *Mount Laurel* view the special masters as hand-puppets of the supreme court. Not only is there a question of objectivity,[155] but there is also a conflict between the special master and the elected official, for if the special master is assisting in the rewriting of the zoning plan, then he or she is necessarily infringing on the duty of the elected official.[156]

2. Simple Remedy for a Complex Goal

Even the *Mount Laurel* courts will admit that exclusionary zoning is a complex public policy issue.[157] Aside from the

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150. *Id.* Chief Justice Wilentz picked Steven Skillman, L. Anthony Gibson and Eugene Serpentelli to serve as the *Mount Laurel* judges. Serpentelli had been a clerk for the former Chief Justice Weintraub and had worked in a small firm that primarily represented zoning and planning boards. During his interview with Chief Justice Wilentz, he was asked whether he had "an automatic aversion to courts being involved [in the deconstruction of barriers to exclusionary zoning]." *Id.* at 104. Serpentelli was never asked about his feelings for the indigent or the need for affordable housing. *Id.*

151. *Id.*; *see* Rose, *supra* note 19, at 831 (implying that there was a direct relationship between the supreme court and the three *Mount Laurel* Judges).

152. *See* N.J. CT. R. 4:41-1 to -5 (1969).

153. *Mount Laurel II*, 456 A.2d 390, 453-55.

154. *See* KIRP ET AL., *supra* note 125, at 102.

155. *See* Rose, *supra* note 19, at 831-32. The "assumption that a court-appointed special master will be more objective than the experts hired by the developer or the municipality" is fallacious. *Id.*

156. *Id.* at 832. For discussion of the separation of powers argument, see *supra* part III.A.

157. Justice Robert Clifford in a concurring opinion wrote:

> While I am inclined to agree with much of his gentle probing of the vulnerable areas, I tend to look upon whatever infirmity may inhere in our position not as the result of flawed analysis but rather as an unfortunate but inescapable by-product of the *judicial* function being called upon to solve the extraordinarily complex problems underlying this litigation—problems whose solution, it may be plausibly argued, should be undertaken elsewhere.

Oakwood at Madison, Inc. v. Township of Madison, 371 A.2d 1192, 1268 (N.J. Super.

question of the court's legitimacy in usurping the duties of the legislative and executive branches, the court as an institution is incapable of solving a complex problem with one ruling.[158] In fashioning its remedy on a crafted constitutional right, the *Mount Laurel II* court is guilty of tunnel vision. While vindicating the right to a fair opportunity to affordable housing, the court had won the battle but lost the war.[159] The public policy of zoning, the socio-economic and political forces that construct both real and imaginary walls around us, was not and could not be addressed by the rezoning remedy.[160]

The simplistic remedy was misleading to the public. "Region,"[161] "fair share"[162] and "least-cost housing"[163] formed a catchy new vocabulary that failed to convey the serious implications behind them.[164] If the court intended these words to establish benchmarks, its message got lost. Instead, the public, seeing the court as a problem-solver, was "galvanized by the initial formulaic result."[165] Neither the court nor the public could foresee the consequences that this simple remedy would have.

IV. SUBURBS'S RESPONSE

For Haar, the judiciary's initial involvement in *Mount Laurel* was unavoidable. By the time *Mount Laurel I* had been initiated, the role of the courts in public law litigation had become

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Ct. 1974) (Clifford, J., concurring), *modified*, 371 A.2d 1192 (N.J. Super. Ct. 1977).

158. *See* HOROWITZ, *supra* note 147, at 35-36.

159. Horowitz argues that courts often view remedies as subsidiary to the vindication of rights. *Id.* at 34.

160. *See* Rose, *supra* note 19.

161. *See generally Mount Laurel II*, 456 A.2d 390, 438-39.

162. *Id.* at 436. "Fair share" requires the calculation of several numbers, such as future jobs and proportion of racial minorities. The court found itself in a Catch-22: if it chose to correlate the allocation formula to a number of future jobs or proportion of racial minorities, they would disregard "principles of sound planning." Instead, if the calculation was too complicated, the judgment of the court would be attacked as an intervention into the legislative process. Rose, *supra* note 35, at 870.

163. *Mount Laurel II*, 456 A.2d at 451-52. "Least-cost housing," which implies that after the well-off move out of the cities and into the suburbs, the poor will be able to take their places, exacerbates problems of inner cities, instead of ameliorating them. *See* Rose, *supra* note 35, at 868 (discussing the effects of the trickle-down theory).

164. *See* Payne, *supra* note 32, at 27.

165. *Id.*

extensive: "the constitutional responsibility to enforce public law norms forced the judiciary to undertake an extensive and, at times, coercive reordering of the way localities managed their land-use regulations."[166] More importantly, a lawsuit had been filed, thus mandating the court's attention to this matter. Haar writes, "[c]ourts by law must hear the claims of illegality put forth by plaintiffs and the responses by defendants and then make a determination."[167] As public servants, the court could not avoid the case.

Having set forth the reasons for initial judicial involvement, *Suburbs* portrays the specific actions taken by the *Mount Laurel* courts as within their powers. Judicial involvement in the executive and legislative branches, extant counter-majoritarianism and creative use of special masters and court procedures were within the "doctrinal experience"[168] of, and fair game to, the *Mount Laurel* court.

A. *Necessity of Judicial Involvement*

Haar suggests that both the legislative and executive branches are partially responsible for exclusionary zoning, and hence, the involvement of the judiciary in the work of the other two branches.

> Surely the failure of the legislative and executive branches to ensure equal access to suburban land was not the product of lack of awareness. . . . But whether owing to short-run views of self-interest, institutional ineffectiveness, or weakness of political will, the metropolitan areas remained unacceptably fragmented and encapsulated from the social and human points of view.[169]

While the malfeasance or nonfeasance of the other branches does not excuse the intrusion into the branches, it does strengthen the case for judicial involvement. In fact, Haar sug-

166. SUBURBS, *supra* note 46 at 186.
167. *Id.* at 176.
168. *Id.* at 149.
169. *Id.* at 177-78.

gests that the involvement of the judiciary was the catalyst for the other branches' interest.[170]

1. Necessary Intrusion into the Legislative Branch

State legislatures delegate the power to zone to municipalities so that they may zone for the general welfare of the state—*"over and beyond the municipality's own boundaries."*[171] This was the thrust of the *Mount Laurel* Doctrine. Inaction by the legislature after *Mount Laurel I* prompted the *Mount Laurel II* court to set forth affirmative remedies that involved zoning decisions, typically the domain of elected zoning officials. The judges' "entering the fray"[172] was represented by their extensive involvement in the determination of regional need and fair share. In *AMG Realty Co. v. Township of Warren*,[173] the court's energy was subsumed by these two determinations, for "until practical meaning was attached to the concept of fair share, no construction of suburban affordable housing could proceed."[174] Haar suggests, then, that although *Mount Laurel II* may have initially tread upon the legislature in coming up with zoning principles, in further defining the principles, the court was only pursuing its stated mandate.

To some extent, the New Jersey legislature responded to *Mount Laurel I*'s offer to enter its policymaking skills into the exclusionary zoning arena. In 1985, motivated by hopes of "removal of the close supervision by the judiciary of local zoning,"[175] the New Jersey state legislature passed the FHA.[176] Legislative intent reveals, however, that most in the legislature believed that instead of dismantling the judiciary, they were preserving the *Mount Laurel* Doctrine.[177] The preamble to the Act evidenced what others might call servility to the judiciary: it codifies the *Mount Laurel* Doctrine.[178] Regaining their

170. *See id.* at 178.
171. *Id.* at 38 (emphasis added).
172. *Id.* at 55.
173. 504 A.2d 692 (N.J. Super. Ct. 1984).
174. SUBURBS, *supra* note 46, at 56.
175. *Id.* at 93.
176. Fair Housing Act, N.J. STAT. ANN. § 52:27D-301 (West 1986); *see infra* part II.B.
177. SUBURBS, *supra* note 46, at 93.
178. *Id.*

senses, the legislature returned to its original task, displacing the courts, with increased zeal. The FHA gave several powers to the COAH, including the power to decide if the "proposed local ordinances and related measures would, if enacted, satisfy the *Mount Laurel* obligation."[179]

The significance of the FHA to the separation of powers argument is twofold. First, it showed that the legislature, although hesitantly, was willing to overlook the intrusions the *Mount Laurel* courts had made in achieving its goal. According to Haar, the FHA serves as the "ratification of the *Mount Laurel* rulings."[180] Second, the FHA demonstrates that the legislature was ready to participate in the battle started by the judiciary. By passing legislation that affected zoning, the legislature had pushed the judicial branch out of the legislative branch. Finally, the legislature had overcome the impasse that prompted the intrusion of the *Mount Laurel* courts.[181]

2. Intrusion into the Executive Branch

Justice Hall's opinion in *Mount Laurel II* left no doubt as to the direction the *Mount Laurel* Doctrine was headed. With its broad constitutional language and provision of affirmative duties, it could be said that *Mount Laurel I* served as a call to arms for the other two branches. As Haar writes, "having set the state constitutional standard, *Mount Laurel I* could be read as an open invitation to the body politic to take charge of the issue through its legislative and executive processes."[182] The

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> [T]he New Jersey Supreme Court, through its rulings in [*Mount Laurel I* and *II*], has determined that every municipality in a growth area has a constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families.

Fair Housing Act, N.J. STAT. ANN. § 52:27D-302 (West 1986). Further evidence of the legislature's acceptance of the *Mount Laurel* Doctrine can be seen in N.J. STAT. ANN. § 40A:12A-16(a)(9) (West 1993), which states that municipalities may "[p]rovide technical assistance and support to nonprofit organizations and private developers interested in constructing low and moderate income housing."

179. SUBURBS, *supra* note 46, at 94; *see* N.J. STAT. ANN. §§ 52:27D-314(a), (b) (West 1986).

180. SUBURBS, *supra* note 46, at 131.

181. *See id.* at 187.

182. *See id.* at 31.

court was forced to act in light of the "mass of physical evidence illustrating the inequity between the separate worlds of inner city and outer suburb."[183]

In the history of *Mount Laurel*, for one branch to claim that the other has violated the separation of powers would be hypocritical. *Suburbs* explains "when courts undertake institutional restructuring as a result of a constitutional violation, the already muddled boundaries among judicial, executive, legislative, and administrative actions become even harder to draw."[184] In creating the statewide trial court, *Mount Laurel II* employed managerial and executive branch devices. The COAH, an executive body,[185] is able to hear and decide motions,[186] both of which are judicial functions.[187] The FHA usurped the power of the executive branch when it created the Fanwood Amendment.[188]

If it still was unclear what the role the executive branch should take in the *Mount Laurel* litigation, *Mount Laurel II* did not mince words. The court incorporated New Jersey's State Development Guide Plan into its computations, thus "placing the onus of refining technological and numerical requirements on the executive branch of government."[189] The state planners had an unequivocal role in deciding whether or not "the fair share obligation applied to them."[190] *Mount Laurel II* was extending a "cooperative hand"[191] to the executive branch and at the same time strengthening its mandate by aligning forces with the state.

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183. *Id.* at 8-9.
184. *Id.* at 134.
185. *See* N.J. STAT. ANN. § 52:27D-305 (West 1986).
186. *See id.* §§ 52:27D-313 to -316.
187. SUBURBS, *supra* note 46, at 134.
188. *See* N.J. STAT. ANN. § 52:27D-311.1 (West Supp. 1996). The Amendment prevents the COAH from requiring a municipality from fulfilling "all or any portion of its fair share housing obligation through permitting the development or redevelopment of property" that would require the demolition of a residential structure in that municipality. *Id.* According to Haar, this provision of the FHA prohibits the COAH from "requiring localities to consider land parcels already improved with sound residential structures as potential sites for *Mount Laurel* Housing." SUBURBS, *supra* note 46, at 103.
189. SUBURBS, *supra* note 46 at 38.
190. *Id.*
191. *Id.* at 39.

B. *The Court Acted Democratically*

The *Mount Laurel* court's protection of minority interests raised concerns whether it was acting capriciously and against majority wishes. Haar rebuts the countermajoritarian argument by suggesting that the surrounding political environment and the media served to keep the court accountable. Sources of judicial restraint, however, were found inside the judicial branch. Haar posits that the "strongly hierarchical"[192] nature of the New Jersey Supreme Court allowed the trial courts to essentially skirt appellate review because they were responsible for their own conduct.

1. Countermajoritarianism Is Necessary

That the *Mount Laurel* judiciary confronted the countermajoritarian dilemma each time it decided a case is a concession Haar readily makes: "Nor should it be overlooked that *Mount Laurel II* was a most courageous act, as deliberate a countermajoritarian measure as it was extraordinary."[193] In fact, Haar suggests that it was the fear that the *Mount Laurel* Doctrine might not withstand the majoritarian threat that prompted the court's "ultimate, if somewhat hesitant, acceptance in *Hills*[194] of the FHA and COAH."[195]

The justices on the New Jersey Supreme Court are appointed and then subjected to periodic reappointment.[196] They do not enjoy the "tenure, salary assurance, and insulation from politics that federal judges enjoy."[197] Chief Justice Wilentz, author of the *Mount Laurel II* opinion, narrowly escaped veto of his reappointment by the senate.[198] To Haar, the reappointment process was a visible constraint upon the judiciary. Protection of minority interests in general, and statements such as, "the

192. *Id.* at 151.
193. *Id.* at 51.
194. Hills Development Co. v. Township of Bernards, 510 A.2d 621, 631 (1986).
195. SUBURBS, *supra* note 46, at 150.
196. *See* N.J. CONST. art. VI, § 6, para. 3 (1947).
197. SUBURBS, *supra* note 46, at 149.
198. *See id.*

State controls the use of the land, all of the land,"[199] constitute evidence of the *Mount Laurel* courts' anti-majoritarian intent.

In light of the blatant countermajoritarianism of the *Mount Laurel* court, Haar implies that the threat of an elected judiciary "limit[s] the independence of a judiciary that must on occasion render antimajoritarian conclusions."[200] Recognizing that courts have a unique role in "the special minority protection that an independent judiciary must provide,"[201] Haar suggests that "a recognized consortium of minority organizations"[202] should be given a special role in the judicial selection. The *Mount Laurel* courts, "in a regime committed to constitutionalism," must protect the interests of those with low and moderate income from elected officials' promulgation of exclusionary zoning ordinances.[203] Haar states that "[t]hus far, the court has remained afloat despite the chop of the political majority."[204]

2. Judicial Review is Not Imperative

Several factors of the *Mount Laurel* litigation make judicial review unnecessary. First, liability was not made an issue of the litigation.[205] This significantly decreased the need for appeal, because most claims of error are filed in hopes of reversing a finding of liability. Second, the "strongly hierarchical" nature of the New Jersey Court system set in stone the "standard of conduct."[206] *Mount Laurel II* became the "Bible."[207] As a result, the trial courts "knew where their parameters lay."[208] Haar writes, "the need for the check on trial court dis-

199. *Id.* at 70.
200. *Id.* at 149.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 153, 176.
206. *Id.* at 151.
207. *Id.*
208. *Id.*

cretion that appellate review would have provided" was reduced.[209]

Third, the judges retained internal control over excessive discretion.[210] The trial courts were burdened by an overwhelming struggle to "adhere to the traditional judicial role, sensitive to accepted constraints on their authority—especially the duty of impartiality—while grappling with novel and complex remedies."[211] Being appointed by the supreme court, the three trial court judges were immediately scrutinized for any traces of partiality. They were scrupulous in the decisions they made because they were held to a higher standard than the regular trial court judge whose decision did not undergo this preliminary, informal judicial review.

Haar suggests that Justice Hall's deliberate insulation of the *Mount Laurel* Doctrine from federal judicial review was ingenious.[212] In order to be successful, Justice Hall had to protect the *Mount Laurel* Doctrine from analysis under the Equal Protection and Due Process Clauses.[213] Justice Hall created a constitutional basis for applying strict scrutiny to what were in effect economic classifications.[214] In addition, while Justice Hall never equated the right to affordable housing with a "fundamental interest," he did state that the right was of basic importance,[215] thus reading the "first paragraph of the first article of the constitution as an equal protection clause."[216]

While some have posited that Justice Hall's deliberate attempt to avoid judicial review was akin to "judicial aggrandize-

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209. *Id.* at 151.
210. *Id.* at 152.
211. *Id.* at 151.
212. *Id.* at 23.
213. *See* U.S. CONST. amend. XIV.
214. *See Mount Laurel I*, 336 A.2d 713, 725.

> Land use regulation is encompassed within the state's police power. . . . It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws[,] . . . the requirements of which may be more demanding than those of the federal Constitution.

Id.
215. SUBURBS, *supra* note 46, at 23 (quoting *Mount Laurel I*, 336 A.2d at 727).
216. *Id.* at 135.

ment,"[217] Haar points out that Justice Hall had no choice. Given the emerging trend in federal courts to discount equal protection arguments in favor of local legislation,[218] Justice Hall's use of state constitutional rights was warranted. According to Haar, "the federal judicial interpretation of the applicability of equal protection clauses to land-use controls had been far more deferential to local decision making than he was about to be in his pathbreaking opinion."[219]

C. *The Court Effectively Combatted Flaws of Adjudicatory Process*

Admittedly, the *Mount Laurel* courts were bound by the adjudicatory process and all of the flaws of that process, such as the generalized knowledge and limited resources of the judges, and the nature of the adjudicatory process. Specifically, one major barrier the *Mount Laurel* courts faced was an inability to grasp the intricacies of zoning. In addition, the courts needed to implement their remedies without holding the hand of the parties involved; herein lies the need for the special master. These court-appointed experts served two roles. First, they were experts in zoning law and could assist judges in navigating the tricky waters of zoning. Second, they proved essential in the implementation of the zoning by providing the judges with continuous progress reports of the implementation of the *Mount Laurel* Doctrine's remedial zoning plans.

The nature of the adjudicatory process was another impediment to the *Mount Laurel* courts. Typically, the judicial process is limited to formulating a verdict of guilt or innocence in the criminal setting, or a judgment of some extent of liability in the civil setting. At issue in the *Mount Laurel* cases, however, was

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217. Rose, *supra* note 19, at 835.

218. *See, e.g.*, Village of Arlington Heights, v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (holding that a denial of a rezoning ordinance did not offend the Equal Protection Clause even though African Americans comprised 40% of the income eligible groups to live in the proposed housing project); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting classification of wealth as a suspect class and deferring to the state's "reliance on local property taxation"). *But c.f.* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (striking down under the rational basis test a zoning ordinance that prohibited use of a group home).

219. SUBURBS, *supra* note 46, at 19.

correcting a wrong, not determining liability.[220] Haar suggests that despite the fact that the complex social issues involved in righting the wrong committed by the municipalities were not conducive to the simple result process of the judiciary, the *Mount Laurel* courts reached a proportionate remedy in the *Mount Laurel* Doctrine.

1. The Use of Special Masters[221]

As a special master in both the Boston Harbor[222] and public school funding litigation[223] perhaps Haar's bias towards special masters is predictable. Set in the context of the *Mount Laurel* litigation, however, it is undeniable that they were indispensable to the whole process. Special masters were court-appointed experts in the field of planning and were able to supply guidance on "arcane matters beyond the usual legal ken."[224] In addition, they served as "political consensus builders"[225] and brought a "professional astuteness . . . [in] determining whether a proposed project and site were suitable from planning and environmental perspectives and . . . whether a builder's remedy should result."[226] Being trained in the "accepted scientific and professional principles of regional land-use planning,"[227] special masters ensured that the limited knowledge of the judges did not hinder the litigation process.

Special masters were on call to answer questions, sit on planning boards, and converse with engineers and concerned citizens.[228] Anticipating the problems inherent in having a court-appointed expert involved in negotiating, amending and testifying on the compliance of a land-use regulation with the *Mount*

220. *See id* at 176.

221. FED. R. CIV. P. 53; N.J. CT. R. 4:41-1 to -5 (1969) (setting forth procedures for using special masters).

222. *See* SUBURBS, *supra* note 46, at xiii, 172; Quincy v. Metropolitan Dist. Council, No. 138,477 (Mass. Super. Ct. Dec. 17, 1982) (Boston Harbor litigation).

223. *See* Board of Educ. v. Boston, 434 N.E.2d 1224 (Mass. 1982); School Comm. of Boston v. Boston, 421 N.E.2d 1187 (Mass. Sup. Ct. 1981) (school funding litigation).

224. SUBURBS, *supra* note 46, at 73.

225. *Id.*

226. *Id.* at 74.

227. *Id.* at 73.

228. *See id.* at 76.

Laurel Doctrine, the court encouraged parties to cross-examine the special master during the stage of compliance review. Haar contends that the court "always retained the fundamental responsibility (and power) for ensuring that constitutionally required standards were observed."[229]

Still, questions remained among the *Mount Laurel* litigants about the neutrality of the special masters. First, there was the fear that a special master, because of her almost daily contact with a judge, would become partial to the judge. Again, the court responded to possible impropriety by rotating the masters and putting them "under clear instructions that they should never offer an opinion or make a comment that would convey the impression that it was attributable to a judge."[230] Thus, the special masters were able to remain independent from the judge.

Second, there was a concern that the special masters would be like "hired gun" lawyers, more than willing to provide the client with the service needed and incapable of being an impartial participant.[231] Once one offered her services as a special master, she could be hired by either side of the litigation.[232] According to Haar, the selection of the special master greatly contributed to solving this problem of neutrality. Haar elaborated, "Whatever the background, whether generalist or specialist, a master above all had to be a finely tuned political animal."[233] *Suburbs* indicates that contrary to the critics of the special masters, the leanings of the professional planners did not play a role in the *Mount Laurel* litigation.

2. Response of Judiciary is Proportionate to Problem

The *Mount Laurel* courts' creation and implementation of a complex remedial scheme runs counter to the American ideal of the adjudicatory process. Most consider courts as the arena in which two parties with adverse interests enter and after the

229. *Id.* at 75.
230. *Id.* at 76.
231. *See id.* at 78.
232. *See id.*
233. *Id.* at 82.

final arbiter—the judge—issues a command, one party exits the victor. The *Mount Laurel* cases, however, forced the courts to "shape a workable remedy."[234]

Due to several factors, the *Mount Laurel* courts were able to bypass the "classic trial procedure [of] . . . assigning liability"[235] and focus on the "task of correcting a continuous pattern of wrongdoing by government."[236] For example, in most cases liability was conceded. In those cases where liability was an issue, political forces had compelled municipal attorneys to assert the municipality's compliance with the *Mount Laurel* Doctrine.[237]

In addition, the *Mount Laurel* courts took advantage of the statutorily granted use of special masters.[238] The special masters assisted the courts in two ways. First, by answering "highly technical questions to do with science or the complex interactions between economic and political policies—questions that form the core of many institutional decrees" they helped the judges "sift[ ] through alternative plans on the basis of practicality."[239] Second, through ex-parte proceedings, they were able to negotiate with parties that were to be affected by the zoning while maintaining the confidences of others. In this way, the courts were able to form a complex, multi-faceted remedy.

Haar suggests that while the ramifications of exclusionary zoning are complex,[240] the problem itself, as phrased by Justice Hall, was simple.[241] The court's remedy was to burden the municipalities with including provisions for low- and moderate-income housing.[242] Concededly, the mechanisms they used to implement the remedy were intricate, but they were necessary

234. *Id.* at 136.
235. *Id.*
236. *Id.*
237. *See id.*
238. *See* N.J. CT. R. 4:41-1 to -5 (1969).
239. SUBURBS, *supra* note 46, at 137.
240. *See id.* at 6.
241. *See id* at 19.
242. *See id.* at 20.

for the solution.[243] Haar demonstrates that *Mount Laurel* could battle a complex problem with a simple solution.

V. CONCLUSION

Many things are still unknown about the environmental,[244] economic[245] and social[246] implications of *Mount Laurel*. Some state that the policies advocated by *Mount Laurel* have resulted in the continued economic decline of the inner cities.[247] Others do not think that *Mount Laurel* will travel well. Early indications are that courts are hesitant to "enter the fray" as the *Mount Laurel* judges did.[248]

What is certain is that by its judicial mandate in *Mount Laurel*, the New Jersey Supreme Court has changed forever the role of courts in land-use planning. Ironically, in some ways *Mount Laurel* represented the judiciary's chickens coming home to roost. For years, the unspoken policy of the New Jersey judiciary was to be very deferential to the local planning boards.[249] Acquiescence on both a national and state level to appointed official's zoning for the general welfare bred abuse.[250] Now it was up to the New Jersey Supreme Court to undo years of dangerous precedent.

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243. *See id.* at 51.

244. *See* Blomquist, *supra* note 39, at 598-611 (discussing the impact of *Mount Laurel* on solar energy development in New Jersey).

245. *See* Jerome G. Rose, *From the Legislatures*, 18 REAL EST. L.J. 371 (1990) (analyzing New Jersey's Transportation Development Act, which allows a county to apply for an exemption from development fees for any development of low- and moderate-income housing units that are built pursuant to the Fair Housing Act of under court settlement).

246. *See* Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623, 625 (1987) (stating that "the lesson of New Jersey is that the legislature will not act without pressure from the judiciary").

247. *See* Rose, *supra* note 19, at 817. Rose argues that lower-income tenants would give a lower total gross rent roll for the owner, which in turn would result in a lower capitalized value of property. The lower market value of the real estate would cause a lower tax assessment of the property and this would result in a reduced tax revenue for the city. *See id.*

248. Payne, *supra* note 19, at 84. In an article comparing *Holmdel* with its contemporaries in New York, Payne says that *Holmdel* would work better in New York because "[it] carries none of the baggage that comes with the *Mount Laurel* doctrine . . . it does not require judges to become land use policymakers. . . ." *Id.*

249. *See* SUBURBS, *supra* note 46, at 132.

250. *See id* at 8.

To the forward-thinking *Mount Laurel* judiciary, intervention was the only way to effect change. Prompted by the inaction of the governor and the legislature, it issued affirmative obligations on all *Mount Laurel*-type municipalities.[251] The obligations appeared simple, but in fact would require the implementation of a complex administrative mechanism, at the heart of which was the special master, and eventually would provoke the legislative and executive branches to join forces with the judiciary. Although to many, the steps taken by the judiciary appeared unprecedented, *Suburbs* makes the point that "[n]one of the trial judges saw himself as writing on a procedurally blank slate."[252] Use of a special master had always been available to the courts, but had never been employed with such efficacy. The *Mount Laurel* courts were determined to use every arrow in their quiver to attain the desired goals.

Notwithstanding the "prescient"[253] opinions of Justice Hall,[254] some were not prepared for the New Jersey Supreme Court to react as strongly as it did in *Mount Laurel II*. Proximity to the harms of exclusionary zoning has proven to be a factor in one's acceptance of the New Jersey judiciary's activism. On the one hand, the justices were plied with statistics revealing employment rates and projected housing for Camden and the suburbs. On the other, those that did not have these numbers saw only a snapshot of the dangerous trend of spatial segregation. Municipalities used exclusionary laws to zone for the welfare of the suburbs, not for the region. For many of these municipalities, the ability to exclude a type of person, black or poor or both, was a right deeply entrenched by years of silent approval. It seems that the status quo has a dulling effect on one's appetite for change.

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251. *See id.* at 187.

252. *Id.* at 152.

253. *Id.* at 17.

254. *See, e.g.*, AMG Assocs. v. Township of Springfield, 319 A.2d 705 (N.J. 1974) (holding that one cannot zone into idleness); Rutgers v. Piluso, 286 A.2d 697 (N.J. 1972) (holding that a right of eminent domain is not determinative of a grant of immunity); DeSimone v. Englewood, 267 A.2d 31 (N.J. 1970) (upholding use variance for low- and moderate-income housing); Vickers v. Township Comm. of Gloucester Township, 181 A.2d 129, 252 (N.J. 1962) (dissenting from decision that held ordinance prohibiting mobile homes was constitutional).

Was the *Mount Laurel* Doctrine effective? *Suburbs* makes the answer unequivocally clear. First, there is the hard evidence: between 1987 and 1993, 11,000 parcels a year were "overseen or influenced" by the courts or COAH; New Jersey municipalities had rehabilitated, zoned, or built 54,000 dwelling units; 14,000 new units of affordable housing were built (nine percent of the total number of housing units built in New Jersey) and 11,000 units rehabilitated.[255] *Suburbs* cautions, however, that "thus far, integration on a physical scale of African-Americans and Latinos from inner-city neighborhoods has fallen short of expectations."[256]

The numbers indicate the physical manifestation of the *Mount Laurel* Doctrine's effectiveness. Equally important, however, is the change in the public's views about the role of the court in correcting social injustices. Ethel Lawrence serves as a testament for the belief that one's undeterred faith in the judicial system will not go unrewarded. For the skeptics, Haar poses this query at the end of *Suburbs*: "Will history conclude that without the intervention of the courts the metropolitan United States would have gone the way of other societies buried under their own contradictions and destroyed by an inability to correct imbalances too glaring and injustices too painful."[257]

As with many legal decisions, a scale should be applied to weigh the consequences of judicial intervention in *Mount Laurel*: On one side are the incredible statistics indicating a severe need for housing in the suburbs in order to accommodate the jobs in Camden, the inaction of the legislative and executive branches, and the converted chicken coops that many African-American residents of *Mount Laurel* were forced to live in. On the other side are the traditions of the separation of powers and judicial restraint. Faced with the dire consequences that would result from inaction, the *Mount Laurel* judiciary chose to enter the fray.[258]

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255. *See* SUBURBS, *supra* note 46, at 189-90.

256. *Id.* at 191.

257. *Id.* at 208.

258. Ironically, it is one of the *Mount Laurel* Doctrine's critics who also suggests that the rationalizing of the *Mount Laurel* Doctrine depends on whether it meets the conditions of the "Holocaust imperative." Rose, *supra* note 35, at 888. The Holocaust

The contribution of *Suburbs* to the land-use discourse is multi-faceted. Foremost, *Suburbs* should be read as a tribute to the achievements of the *Mount Laurel* judiciary in effecting a positive change in the area of exclusionary zoning. In addition, Haar demonstrates that the success of the activist judiciary should not be limited to land-use cases. Whenever there is stagnancy among the executive and legislative branches, and the judiciary is asked to resolve an issue, as Ethel Lawrence asked the New Jersey courts, the intrusion of the judiciary is both appropriate and necessary. Finally, balancing the strengths of an activist judiciary with an examination of its flaws, Haar provides a realistic look at the inability of the judiciary to "descend from the mountain"[259] to gain public support for its lofty principles. Haar appears genuinely concerned with the ability of the courts to get their messages to the public, for it will be the one to live with the decisions.

Finally, for the careful student of land-use, the activism of the New Jersey judiciary should not come as a surprise. Justice Sutherland proved extremely prophetic in *Euclid*[260] when he suggested the "possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[261] It is not surprising that Justice Hall used this language in *Mount Laurel I*.[262] Like *Euclid*, *Mount Laurel* has and will continue to set precedents in the area of land-use law. However, as *Suburbs* demonstrates, the success of the New Jersey courts in remedying the harm done by exclusionary zoning should remain unparalleled as an example of the invaluable role of the activist judiciary.

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imperative implies that if the "evils of exclusionary zoning are sufficiently onerous, and the remedies sufficiently workable," then the *Mount Laurel* Doctrine was justified. *Id.*

259. SUBURBS, *supra* note 46, at 172.

260. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

261. *Id.* at 390.

262. 336 A.2d 713, 726.